APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1966—JANUARY SESSION, 1967

No. 15679
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HOMER PHILLIPS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 7, 1967

Before KNOCH, KILEY and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Melsia Delaney and appellant Homer Phillips were indicted for knowingly receiving and concealing a narcotic drug in Chicago on April 24, 1964, in violation of 21 USC § 174. A jury found Mrs. Delaney and Phillips guilty. Phillips was sentenced to imprisonment for 10 years. Mrs. Delaney's motion for a new trial was granted and she subsequently pled guilty to a lesser charge.

Pursuant to a search warrant, Federal Narcotic Agents seized a large quantity of narcotic drugs in the first floor apartment at 8004 South Yale Avenue, Chicago, Illinois, at 3:00 P.M. on April 24, 1964. These drugs were discovered in a telephone book there by Agent Hill in the

presence of Mrs Delaney. Homer Phillips was not in the apartment at the time of the search and seizure.

The evidence showed that at 2:00 A.M. on April 24, 1964, Federal Narcotic Agents Hill and Pringle observed Homer Phillips driving to South Yale Avenue.[1] Phillips parked his car on 80th Street and entered the first floor apartment at 8004 South Yale. Ten minutes later, he left the building and drove his car to the 7100 block of South Halsted Street. After parking, he entered the New Waikiki Lounge at 7112 South Halsted Street. Agent Hill observed Phillips hand his brother Tommie an aluminum foil package, which Tommie put in his overcoat pocket. Shortly thereafter, Johnny Littleton drove Tommie from the tavern to the 4100 block of South Federal Street. The car was then curbed by Agents Hill and Pringle, who identified themselves as Narcotics Agents. At that point, Tommie jumped from the car and ran east through the Chicago Housing Project buildings at 4101 South Federal Street. Agent Hill pursued him and saw Tommie throw an aluminum foil package over a small fence surrounding the Edward Hartigan School. Hill apprehended Tommie in an alley in the vicinity and returned him to Littleton's car, where Agent Pringle was waiting with Littleton. Hill then returned to the place where Tommie had thrown the aluminum foil package and recovered it. The package contained a quantity of white powder.

Agent Pringle searched Tommie and found no other packages on his person. After Pringle and Hill brought Littleton and Tommie to the Bureau of Narcotics, the white powder in the aluminum foil package was tested and shown to contain an opiate. Tommie was subsequently indicted. This record does not show the disposition of his case.

At 8:30 A.M., Hill returned to 8004 South Yale and kept the apartment building under surveillance until Agent Pringle arrived at 3:00 P.M. with a search war-

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[1] Agent LaBree accompanied Agents Hill and Pringle but was not a witness at the trial.

rant. Pringle and Agent Prziborowski entered the front of the building. After no one answered the doorbell of the first floor apartment, Pringle knocked on the door and announced his office and intent. There being no response, Pringle forced the door open and entered. Mrs. Delaney was then walking toward Pringle from the kitchen of the apartment. At that time, Agent Hill entered the rear of the apartment. In searching the living-room, Hill picked up the Chicago telephone directory, and a manila envelope fell from it. The envelope contained a large quantity of white powder. Mrs. Delaney denied that the envelope belonged to her. She also denied knowing Homer Phillips. The white powder was later tested at the Bureau of Narcotics and was found to contain 126 grams of heroin.

Three days thereafter, Homer Phillips was arrested by these Federal Narcotic Agents at the New Bonneville Lounge in Chicago. Phillips admitted that the heroin in the manila envelope found at 8004 South Yale belonged to him. He also admitted that he had lived at the apartment, but not recently. With reference to the manila envelope containing heroin, Phillips told Agent Pringle "Well, you know, that wasn't her [Mrs. Delaney's] stuff that you got out of my pad. That was mine."

Necessity for Hearing on Motion to Quash

Phillips first asserts that it was mandatory for the District Court to hold a hearing on his motion to quash the search warrant and suppress evidence. The motion pointed out that Phillips, as Mrs. Delaney's "boy-friend", had full right of occupancy of the first floor apartment at 8004 South Yale Avenue. His June 2, 1965, motion adopted a May 19, 1965, motion to quash filed by Mrs. Delaney. The pertinent ground of her motion was that the search warrant was improperly executed. If the testimony of Agent Pringle is credited, the entry was valid. 18 USC § 109; *Miller v. United States,* 357 U.S. 301.

Mrs. Delaney's motion was denied on May 24, 1965, "without prejudice". On June 4, 1965, the District Court

continued the case until June 23, 1965, "for trial and ruling on motion of defendant Phillips to quash search warrant and suppress evidence". This contradicts Phillips' claim that he did not renew his motion to quash and suppress because Mrs. Delaney's similar motion had previously been denied. Also, Phillips' seasoned trial counsel would not have adopted her denied motion if he considered the denial to be a complete disposition of the matter. Under Rule 41(e) of the Federal Rules of Criminal Procedure, it was within the Districts Court's discretion to entertain the motion to suppress at the trial instead of passing upon it before trial. Since Phillips' counsel knew that the District Court had already denied Mrs. Delaney's identical motion to quash, it was Phillips' obligation to renew the motion at the trial. *Di Bella* v. *United States,* 369 U.S. 121, 129-130, Note 9; cf. *Cheng Wai* v. *United States,* 125 F.2d 915, 916-917 (2d Cir. 1942).

Our examination of the transcript of the proceedings before the District Court reveals that defendant's counsel was fully aware that the District Court had denied the belated motion of Mrs. Delaney without prejudice and that it would be incumbent upon him to raise the point again if he wished to press it. For example, the following colloquy occurred on September 21, 1965, when the case was called for trial:

> "THE COURT: There is a motion to suppress in this, isn't there, that I will have to hear? Has that been denied on the face of it?
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> MR. PINCHAM [attorney for Homer Phillips]: Your Honor denied the motion on the face of the petition.
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> THE COURT: Without prejudice to listen to it in the trial of the case?
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> MR. PINCHAM: That is right, yes.
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> THE COURT: So, actually it is just a matter of trying the case.
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> MR. PINCHAM: That is what it boils down to."

During the November 1965 trial, neither Homer Phillips nor Mrs. Delaney raised their motions to quash the search

warrant and suppress evidence. We agree with the Government that Phillips waived his right to a hearing on this motion because of failure to renew it when the District Court had granted him permission to do so. Phillips' brief concedes that he did not pursue or develop the search warrant execution issue at the trial. It is now too late to present that issue. *United States* v. *Chieppa,* 241 F.2d 635, 637-638 (2d Cir. 1957), certiorari denied, 353 U.S. 973; *Butler* v. *United States,* 153 F.2d 993, 994 (10th Cir. 1946); *Morton* v. *United States,* 147 F.2d 28, 30, Note 4 (D.C. Cir. 1945), certiorari denied, 324 U.S. 875. Furthermore, there was no showing to warrant the granting of a hearing on the motion to suppress inasmuch as the motion contained no offer to prove that the warrant was illegally executed, nor did the prayer of the motion show why a hearing was needed.[2] *United States* v. *Achilli,* 234 F.2d 797, 806 (7th Cir. 1956), affirmed, 353 U.S. 373.

Sufficiency of the Search Warrant Affidavit

Phillips next asserts that the affidavit for the search warrant did not set forth facts to establish probable cause for its issuance.[3] The most recent authoritative consideration of this question appears in *United States* v. *Ventresca,* 380 U.S. 102, 108-109. That case teaches that such affidavits need not be elaborate or technical. The affidavits are to be tested "in a commonsense and realistic fashion". With this test in mind, we have examined the supporting affidavit of Agent Pringle. The affidavit shows that Pringle and others had surveyed the premises at 8004 South Yale during the prior year and had observed several known narcotic peddlers entering and leaving Homer Phillips' first floor apartment there. Pringle stated

[2] The illegal execution point was only mentioned in one conclusory sentence in the 30-page motion to suppress. No factual allegations were made to show why a hearing would be appropriate.

[3] The Government does not claim that this point was waived below.

that he knew that Phillips dealt in narcotics for seven years in Chicago and in St. Louis, and that in 1956 he had been convicted in St. Louis of unlawful possession of narcotics. The affidavit then related the 2:00 A.M. April 24th episode described above.

The cases on which defendant relies antedate *Ventresca*. In many of them the affidavits were based on hearsay. This affidavit was based on Pringle's personal knowledge and amply justified the United States Commissioner's conclusion that there was "probable cause for believing the existence of the grounds for which the warrant was issued" (Rule 41(e) of the Federal Rules of Criminal Procedure). *Walker* v. *United States*, 327 F.2d 597, 598-599 (D.C.Cir. 1963), certiorari denied, 377 U.S. 956; *Chin Kay* v. *United States*, 311 F.2d 317, 320 (9th Cir. 1962).

Testimony Concerning Tommie Phillips

Homer Phillips also contends that the District Court should not have permitted any testimony concerning the 2:00 A.M. Tommie Phillips episode, on the ground that it revealed another crime committed by Homer Phillips. In *United States* v. *Wall*, 225 F.2d 905, 907 (7th Cir. 1955), certiorari denied, 350 U.S. 935, we determined that evidence of other criminal acts is admissible when related to or connected with the crime charged. We also pointed out that such evidence is admissible to show intent or knowledge. Without objection, the District Court's instructions concluded that both intent and knowledge are ingredients of this crime.[4] This accords with *Morissette*

[4] The following are 21 USC § 174 narcotics cases in which evidence of defendant's participation in other narcotics transactions was held admissible to show knowledge or intent: *Medrano* v. *United States*, 285 F.2d 23, 25-26 (9th Cir. 1960), certiorari denied, 366 U.S. 968; *Bible* v. *United States*, 314 F.2d 106, 108-110 (9th Cir, 1963), certiorari denied, 375 U.S. 862; *United States* v. *Abbamonte*, 348 F.2d 700, 704 (2d Cir. 1965), certiorari denied, 382 U.S. 982. In *Medrano* and *Bible* the transactions were clearly more remote in time than those involved in this case.

v. *United States*, 342 U.S. 246, 270, 273 (interpreting Section 641 of the Criminal Code (18 USC§ 641)).

The Tommie Phillips episode tended to show that Homer Phillips knew of the presence of narcotics in the South Yale Avenue apartment and intentionally committed this crime. Here the evidence of another criminal act of Homer Phillips was blended or connected with the crime of which he was accused. Therefore, there was no error in receiving evidence of the Tommie Phillips incident.

Defendant also argues that the Tommie Phillips evidence was objectionable because the defense was taken by surprise. This argument is not well-taken. During the prosecutor's opening statement, defendant's counsel objected just as the prosecutor was reaching the Tommie Phillips incident. During his objection, defendant's counsel told the Court about the Tommie Phillips matter, belying any surprise. Moreover, he cross-examined Agents Hill and Pringle in such detail that he had obviously thoroughly prepared this aspect of the case. Therefore, we consider the claim of surprise to be without merit.

Defendant also asserts that the jury might have confused two crimes: (1) the 3:00 P.M. April 24th, South Yale Avenue unlawful narcotics possession for which he was indicted and (2) the criminal incident involving Tommie Phillips occurring 12 or 13 hours prior thereto. We conclude that sufficient measures were taken in the District Court to dispel any confusion between the two crimes. Thus the District Court gave the following instruction:

> "Now, the indictment charges the defendant with a crime of possession or concealment of narcotics which has been heretofore defined in these instructions. Each defendant is on trial only for the crime that is charged in the indictment and you must decide whether the government has proved that he or she is guilty of that particular crime and beyond a reasonable doubt of that crime alone."

Defense counsel did not submit any written instruction to elaborate upon that point, as required by Rule 30 of the Federal Rules of Criminal Procedure. In fact, he advised the Court that "We don't have any instruction * * *". Any error in the instruction is no longer viable. *United States* v. *Smith*, 283 F.2d 760, 763-764 (2d Cir. 1960), certiorari denied, 365 U.S. 851.

It is noteworthy that during his cross-examination of Agent Hill, defendant's counsel admitted that the Government was not trying Homer Phillips for the Tommie Phillips event. Thus the following colloquy occurred between Phillips' counsel and Agent Hill:

> Q. Now, neither of these defendants [Homer Phillips and Mrs. Delaney] are here charged with having transferred or dispensed that object to Tommie Lee Phillips, are they?
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> * * *
>
> A. No, sir."

In his closing and rebuttal statements, the Assistant United States Attorney advised the jury on several occasions that it was only to pass upon the April 24th afternoon possession of narcotics at 8004 South Yale Avenue, and that the Tommie Phillips incident was only offered to show Homer Phillips' knowledge and intent, as required by the statute.

We are satisfied that any possible confusion between the two offenses was sufficiently dispelled by the District Court and by counsel for both sides.

On the ground that there was an insufficient chain of evidence, Phillips states that the Government did not show that the package Homer Phillips gave to Tommie Phillips about 2:00 A.M. on April 24 was the same package discarded soon thereafter by Tommie. Without objection, the District Court instructed the jury that circumstantial evidence is proof of a chain of facts to be weighed by the jury. Their verdict showed that they were satisfied that the package transferred from defendant to his

brother and the one found by Agent Pringle were the same package, and that it contained a narcotic drug. The uncontroverted testimony showed that Littleton's car and person and Tommie were searched by Agent Pringle, and no aluminum foil package was found except the one Tommie had discarded at the Edward Hartigan School. Therefore, it was permissible for the jury to conclude that the package found at the school was the same package Homer Phillips had just previously given Tommie in the New Waikiki Lounge. It was the duty of the jury to weigh this evidence. Its finding against defendant was a reasonable one to draw from the evidence and consequently may not be disturbed. *United States* v. *Wilson,* 361 F.2d 134, 136 (7th Cir. 1966).

. Testimony as to Previous Jail Sentence

Defendant complains of Agent Pringle's direct examination testimony as to why defendant did not wish to sign a statement of guilt, defendant stating to Pringle "No, I don't want to go back to jail either". This sentence was volunteered as part of a lengthy answer of Pringle in explaining what occurred when Homer Phillips was arrested. There is no claim that the answer was deliberately elicited by the Assistant United States Attorney. In fact, this subject was raised by defense counsel's prior recross-examination of Agent Hill when Hill was asked "Now, when you got downtown, he [Homer Phillips] told you he wouldn't sign a statement because he didn't want to go to jail, is that right?"

When defendant objected to Pringle's answer, the entire post-arrest conversation between defendant and Pringle was immediately stricken by the District Court. Also, the jury was then and later instructed to disregard any stricken testimony. In view of defendant's own admissions and other strong evidence of guilt, "the conviction is sure that the error did not influence the jury or had but very slight effect", so that the verdict and the judgment should stand. *Kotteakos* v. *United States,* 328 U.S. 750, 764; *United States* v. *Levi,* 177 F.2d 827, 830, 831 (7th

Cir. 1949); *United States* v. *Haskins*, 345 F.2d 111, 115-116 (6th Cir. 1965). Even where a witness testified that a defendant was No. 7 on the national list of major violators of the narcotics laws, the conviction was affirmed because the District Court promptly sustained the objection and instructed the jury to disregard the statement. *United States* v. *Angelet*, 231 F.2d 190, 192 (2d Cir. 1956), certiorari denied, 351 U.S. 952. The brief, unemphasized reference to defendant's having been in jail does not amount to prejudicial error in view of the prompt exclusion of the statement and the instructions given twice by the trial court.[5]

The Court has considered the remaining arguments of defendant and finds them to be insubstantial.

Affirmed.

No. 15679

KILEY, *Circuit Judge*, dissenting.

I respectfully dissent. In my opinion Homer Phillips was denied a fair trial by the admission, over his repeated objection, of the testimony detailing the transaction between defendant and Tommie Phillips, the denial of repeated motions to strike the testimony, and the failure to limit the jury's consideration of that testimony to the element of knowledge and intent. The likely result of these ruling was confusion in the jurors' mind of the offense charged in the indictment with whatever offense was disclosed by the testimony of the Tommie Phillips transaction.

I agree with the majority that defendant was not prejudiced through surprise at the introduction of evidence of the Tommie Phillips transaction. The majority's second reason, as I understand it, for approving the

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[5] *Evenson* v. *United States*, 316 F.2d 94, 95-96 (8th Cir. 1963); see also *Huerta* v. *United States*, 322 F.2d 1, 3 (9th Cir. 1963), certiorari denied, 376 U.S. 954; *Conner* v. *United States*, 322 F.2d 647 (5th Cir. 1963).

admissibility of the evidence, is that this transaction was "blended or connected with" the crime of concealing the narcotics found in the flat. There was no evidence, nor legal inference justified, that the tinfoil package the defendant gave to Tommie Phillips contained heroin taken from the narcotics in the flat. Even if such an inference were justified, the transaction was not relevant to "complete the story of the crime on trial." McCormick, Evidence § 157, at 318 (1954); compare *United States* v. *Levine*, No. 14921, 7th Cir., Feb. 9, 1967.

The third reason stated by the majority, that the Tommie Phillips transaction testimony was offered to prove knowledge and intent, does not of itself justify the admission of the testimony. The underlying purpose of the rule as to admission of "other crimes" testimony is to prevent unfair prejudice to the defendant while admitting all relevant evidence. That purpose is subverted by the majority's result because the prejudice caused by the testimony of the Tommie Phillips incident far outweighs its probative value on the issue of knowledge and intent. A balancing rather than mechanical approach has been applied by the courts where the "other crime" was not substantially similar to the crime charged, *Enriquez* v. *United States*, 314 F.2d 703 (9th Cir. 1963),[1] and has been approved where the issue of intent has not been raised by the defendant. *United States* v. *Smith*, 283 F.2d 760 (2d Cir. 1960) (dicta), *cert. denied*, 365 U.S. 851 (1961); *cf. United States* v. *Magee*, 261 F.2d 609 (7th Cir. 1958). The late Professor McCormick sharply criticizes the mechanical approach and cites a number of state cases in support of the balancing approach to the other-crimes evidentiary problem. McCormick, *op. cit. supra* § 157, at 332.

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[1] In *Enriquez*, the Ninth Circuit held that evidence of prior use of marihuana was inadmissible on the issue of intent in a case involving the sale of heroin. 314 F.2d at 717.

In my view the factors to be considered in determining the admissibility of the testimony of the Tommie Phillips transactions are:

1. the weight of the evidence that the defendant committed a crime by participating in the transaction;
2. the probative value of the testimony on the issues of intent and knowledge;
3. the necessity of using it in view of the issues raised by the defendant and the other evidence available to, and used by, the prosecution;
4. the danger of arousing hostility in the jury by showing the defendant to be a "bad man"; and
5. the danger of confusing or misleading the jury by the introduction of a side issue and consuming an undue amount of time.

See *Michelson* v. *United States,* 335 U.S. 469, 475-76 (1948); McCormick, *op. cit. supra* § 157, at 332, & § 152, at 319; Uniform Rule of Evidence 45.[2]

On this record, the first two of these factors weigh in favor of admission, but not heavily. With respect to the first, there is some doubt that the defendant committed

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[2] In discussing the background of the rule in a context not relevant here, the *Michelson* Court said:

> The inquiry [into other crimes] is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. (Footnotes omitted.)

335 U.S. at 475-76.

a crime by handing the tinfoil package to Tommie Phillips. There was no proof of knowledge by defendant that the package given was hard put to show that this package was the one found by the government chemist to contain heroin. As for the second factor, the dissimilarity between an exchange (the "other crime" with Tommie Phillips) and a concealment (the crime charged) would not of itself bar admission on this record. Compare *Enriquez* v. *United States*, 314 F.2d 703 (9th Cir. 1963).[3]

The last three factors, on the other hand, weigh heavily for exclusion of the evidence:

Third factor. There was other evidence not only available but used by the government from which the jury could find intent and knowledge.[4] Moreover there was no substantial issue of intent. Yet the jury was told of the incident in the government's opening argument over defense objection. The first government witness began his testimony by relating the incident, again over objection, and the incident grew in importance as the government's case in chief progressed. A different question would be presented if the defendant had specifically raised the issue of knowledge and intent. The government then might properly meet that defense by introducing the other-crimes testimony on rebuttal. But, in fact, the defendant did not take the stand or offer other evidence on this issue. I think it was unfair to buttress an other-

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[3] It appears from the cases that similarity between the "other crime" and the crime charged need not be as precise in cases involving the intent exception, such as *Enriquez*, as in cases involving the "distinctive handiwork exception. *E.g., compare United States* v. *Wall*, 225 F.2d 905 (7th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956), *with United States* v. *Magee*, 261 F.2d 609 (7th Cir. 1958).

[4] There was the finding of the substance, stipulated to be heroin, in the flat used at times by the defendant, the testimony of codefendant Melsia Delaney of her relationship with defendant and the admission of the defendant that both the "pad" (apartment) and the heroin were his.

wise sufficient amount of evidence on this issue with testimony of questionable probative value and undisputable prejudicial effect.[5] *United States* v. *Smith*, 283 F.2d 760 (2d Cir. 1960) (dicta), *cert. denied*, 365 U.S. 851 (1961). The presumption of innocence cannot raise the issue so as to justify serious prejudice in these circumstances.[6] *United States* v. *Magee*, 261 F.2d 609 (7th Cir. 1958).

Fourth factor. This testimony unduly prejudiced the defendant by giving an aspect of criminality to him—even if the testimony of the Tommie Phillips transaction was not legally sufficient to show that the defendant com-

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[5] In this context it should be pointed out that the rule and its exceptions are premised upon the inherent existence of prejudice in evidence of other crimes—which, in some circumstances, is overcome by considerations of relevancy.

[6] As Lord Summer, an English jurist, has put it:

> Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue raised must be the one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice.

Thompson v. *The King*, [1918] App. C. 221, 232.

In *Smith*, the Second Circuit affirmed on the ground that the other crimes was admissible on an entrapment issue. But with respect to the issue of intent, the court said it was not admissible since the "only" issue was whether any sale of heroin had been made. 283 F.2d at 763. In *Magee*, a bank robbery case, this court noted that other bank robberies were not admissible on the issue of intent because there was "obviously" no question of the bank robber's intent, 261 F.2d at 612, and reversed because the other bank robberies were "not connected" to the bank robbery charged.

mitted a crime, it raised the specter of his "bad" character.

Fifth factor (and most important in my view). The undue time and emphasis involved in the testimony of the Tommie Phillips incident, as well as its dramatic impact, must have confused the jury. This was not only the most interesting story in the government's case, it was the first one told. The finding in the flat of the offending heroin, the subject of indictment, was not of comparable interest. And the Tommie Phillips story is the one which must have made the most vivid impression on the jury. Relevancy required showing that the tinfoil package handed to Tommie Phillips contained heroin. This necessitated establishing the "chain of possession" from the time defendant gave Tommie Phillips the package until the contents were chemically tested. And this in turn required introduction of the dramatic details of Tommie Phillips' attempted getaway, the pursuit, the throwing away of the package, and the arrest. Faced with the admission of this evidence, defense counsel was forced to attempt to reduce its effect by challenging, with considerable success, the contents of the package through cross-examination, thus highlighting this evidence for the jury. This diverted the jury to the question: "Did that (Tommie Phillips) package contain heroin?" and away from the central issue: "Did the defendant violate section 174 by possession of heroin in the flat?"

Neither cross-examination by defense counsel nor closing argument by government counsel could supplant the trial court's duty to insure that the jury fully understood the issues and the relevance of the evidence to them. The general instruction quoted by the majority did not adequately fulfil this duty either. The "crime that is charged in the indictment" was not specific enough to distinguish the Tommie Phillips transaction from possession in the

flat.[1] The court's instruction that the indictment charged "possession or concealment" as defined in its previous instructions was no more enlightening to the jury, for both this phrase and the previous instructions were broad enough to apply to both sets of facts.

It is true that defendant tendered no written instruction. His counsel did say, "We don't have any instruction," but this was clearly a reference to a reasonable doubt instruction. A great part of the colloquy over instructions was given to the question of an instruction limiting the testimony of the Tommie Phillips episode to the knowledge and intent element. Defendant's attorney persisted in arguing for an instruction using care to inform the jury that defendant was charged only with possession of the heroin in the flat and not with possession of the heroin which Tommie Phillips received from defendant and threw away. The district court finally decided to give the general instruction set out in the majority opinion, having stated it would not give "the instruction suggested by the defense" because it wanted to instruct generally on the point and not "upon the facts of the case." Defense attorney asked whether the court was "denying the tendered instruction I have suggested. . . ." The court said "Yes."

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[1] The indictment charged:

> That on or about April 24, 1964, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,
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> HOMER PHILLIPS and MELSIA RUTH DELANEY,
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> defendants, did then and there fraudulently and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of approximately 126.300 grams of heroin, a narcotic drug, which had been previously imported into the United States contrary to law, knowing the same to have been so unlawfully imported; in violation of Section 174, Title 21, United States Code, as amended by the Narcotic Control Act of 1956.

The narcotics cases referred to in footnote 4 of the majority opinion do not militate against my dissent. First of all, determination of whether the general rule or exception applies depends upon the facts in each case. In *Medrano* v. *United States,* 285 F.2d 23 (9th Cir. 1960), *cert. denied,* 366 U.S. 968 (1961), the more detailed instruction given by the court is sufficient to distinguish that case. And there was no indication by the court that the "other crime" was any different from that charged. In *Bible* v. *United States,* 314 F.2d 106 (9th Cir.), *cert. denied,* 375 U.S. 862 (1963), the court instructed the jury at the time the testimony was admitted, and again at the end of the case, with respect to the limitation to the purpose of the testimony. And the crime charged there was precisely the same as the "other crimes." In *United States* v. *Abbamonte,* 348 F.2d 700 (2d Cir. 1965), *cert. denied,* 382 U.S. 982 (1966), the court merely stated the general rule, citing *United States* v. *Massiah,* 307 F.2d 62 (2d Cir. 1962), *rev'd on other grounds,* 377 U.S. 201 (1964). And in *Massiah* there was no discussion whatever of the rule. In none of these cases was there any serious question of introducing a side issue which would have confused the jury.

Finally, *United States* v. *Wall,* 225 F.2d 905 (7th Cir. 1955), *cert. denied,* 350 U.S. 935 (1956), cited by the majority as primary authority, does not support admission of the Tommie Phillips incident. That case involved the exception allowing proof of other crimes showing the "distinctive handiwork" of the defendant on the issue of identity. The unique "modus operandi" of the defendant there rendered the other-crime evidence in that case highly probative of identity. And the other-crimes evidence there involved no vivid side issue capable of prejudicing the defendant.

The "bad man" prejudice from the Tommie Phillips incident was aggravated by Agent Pringle's testimony that the defendant had told him he did not want to go "back to jail." I find it impossible to dismiss the "back

to jail" testimony as having "very slight effect" as the majority indicates. Although the reference was obviously "brief," it cannot be called "unemphasized." Immediately following this statement of Pringle's, defense counsel moved to strike the testimony or, alternatively, for a mistrial. The court instructed the jury to disregard that portion of Agent Pringle's testimony and then adjourned court for the day. As the jury filed by the witness stand, one juror remarked to Agent Pringle to the effect that he had "better watch that," clearly referring to the "back to jail" remark that was stricken. If the effect of the testimony and its being stricken impelled one juror to this impropriety. I doubt that it can be said to have had merely slight effect on the other jurors.

Due process required that the jury try Homer Phillips on the crime charged. I have a grave doubt that the jury could have done so on this record. Accordingly, resolving that doubt in favor of defendant, I would reverse and remand for a new trial.

APPENDIX B

CONSTITUTIONAL PROVISIONS, RULE AND STATUTE INVOLVED

UNITED STATES CONSTITUTION,
AMENDMENT IV:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

RULE 41 (e), FEDERAL RULES OF CRIMINAL PROCEDURE:

"*Motion for return of property and to suppress evidence.* A person aggrieved by an unlawful search and seizure may move the District Court for the District in which the property was seized for the return of the property, and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing on trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial on hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at trial or hearing."

TITLE 21, SECTION 174, UNITED STATES CODE:

"Whoever fraudently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being

imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

APPENDIX C

COLLOQUY ON SETTLING OF INSTRUCTIONS— FROM VOL. 2 OF THE CERTIFIED RECORD FILED IN THE UNITED STATES COURT OF APPEALS.

651 Mr. Pincham: Judge, may I respectfully object to 4.04—"The crime charged in this case requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish intent, the Government must prove the defendant knowingly did an act which the law forbids, or knowingly to do an act which the law requires, purposely intending to violate the law. Such intent may be deter-
652 mined from all the facts and circumstances surrounding the case and from similar prior crimes and transactions."

I question first that this offense is a specific intent offense and I question it because the last paragraph of the section creates a presumption and it say—Section 174, Title 21—and correct me if I am wrong, but the substance of it is that whoever is shown to have possession of a drug, it is presumed that it was imported contrary to law, and I think the burden is on the defendant to establish to the satisfaction of the jury that his was something other than unlawful.

• • •

662 The Court: All right, I will take out 4.04, 4.05 and 4.06 . . .

• • •

684 Mr. Plunkett: Your Honor, I did not find a Judge LaBuy instruction on it. He attempted to cover it in that one sentence in 4.04. . . . I would like to tender

this now, . . . It is marked as Government's tender.
685 It is just referred to as 1.

The Court: Is there any objection?

Mr. Pincham: My objection to this instruction—most assuredly, emphatically and zealously there is an objection . . . How is the jury going to know how to apply this, because so far the jury has not been instructed as to what the defendant is here charged with or what narcotic he is charged with. This is something the government injected into the case which
686 has caused the confusion. . . . We emphatically object to this instruction and, while we are on this question, Judge, we are going to ask the Court to instruct the jury to the effect that these defendants are charged and on trial in this indictment with the transportation, concealment, et cetera, of only those narcotic drugs that were allegedly seized from the premises of 8004 South Yale Avenue on the afternoon of April 24, 1964, and they are not charged or on trial for the unlawful transportation or concealment of any other drug, and particularly an instruction to the effect that these defendants are not charged or on trial for the transportation or concealment of any drug allegedly seized from Tommie Phillips in the early morning
687 hours of April 24, 1964 at about 41st and Federal Avenue.

I did a little work last night on this problem, your Honor, and I would like to advise the Court and give the Court the benefit of it because I don't want to at a later date be accused of not having completely and fully advised the Court, in other words, I want the record to completely recite the position of the defendant Homer Phillips so that at a later date, if such time as a later date arrives, if cannot be said of

me I did not advise the trial court as to what our position was.

I would appreciate it if you would give me no more than just five minutes to briefly summarize our position, . . .

720 The Court: Well, this one here before me [government's tendered,] I shall deny . . . I will give 4.04.
721 . . . I think it is 4.04, even though it doesn't give the emphasis that I would like, which gives the law and
722 allows you to argue as far as you wish your facts within the scope of that law. The same thing is true with the instruction suggested by the defense. I think it is unnecessary. I dislike entirely ever commenting directly upon the facts of the case in my instructions. I want them to have general principles of law. So that will be denied. The other motions will be denied.

We will take a five minute recess and I will have the jury brought in.

Mr. Pincham: Your Honor, do I understand that you are denying the tendered instruction I have suggested when I stood before the bar—

The Court: Yes.

Upon Conclusion of the Court's Charge to the jury.

822 Mr. Pincham: My other motion, if your Honor please,—I understand we must again state our objections with regard to the instructions, and my objection here—and I do not say this to minimize it,
823 but my objection is that the jury has not yet been instructed by instruction from the Court on what the indictment charged the defendants with or that it does not charge the defendants with the possession nor transportation of the drugs which Tommie Lee Phillips had. This, of course, is occasioned by the problem of

separate transactions being injected into the case, and because of the Court's failure to instruct the jury as to what narcotics the defendants were being charged with transporting, concealing, et cetera, and because of the Court's failure to instruct the jury they are not on trial for the transportation, concealment, et cetera, of the narcotic drugs Tommie Lee Phillips had the evening of April 24, '64, we object to that failure of the Court to so instruct.

The Court: Are there any other objections?

Mr. Gerber: I think Mr. Pincham has—

Mr. Pincham: Well, I am dubious, but did I object to the specific intent thing?

824 Mr. Gerber: Yes, you did.

Mr. Pincham: I thought I did.

Mr. Berber: I think that was the Court's recommendation.

The Court: Those objections may stand of record as objections to the charge in the case. In addition, all other objections heretofore made to the instructions with the agreement of the parties may stand as objections to the charge of the Court as it has been delivered to the jury.

APPENDIX D

The affidavit for the search warrant is in words and figures as follows, (A. 14-16):

"UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA
Commissioner's Docket No. 22

V.

Case No. 10875

A two-story brick building,
first floor apartment
located at 8004 S. Yale,
Chicago, Illinois

AFFIDAVIT FOR SEARCH WARRANT

Before C. S. Bentley, Pike Room 828 U.S. Courthouse, 219 S. Clark Street, Chicago, Illinois. The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as the first-floor apartment located at 8004 Yale, Chicago, Illinois, in the Northern District of Illinois, there is now being concealed certain property, namely a quantity of narcotic drugs, which are being concealed in violation of Title 21, Section 174, United States Code, and that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: Investigation conducted at the above-described premises by Federal Bureau Narcotic Agents. During the past year surveillance has

been conducted on the above-described premises at 8004 S. Yale by affiant and Federal Bureau of Narcotic Agents Hill, LaBree, Prziboroski and Coulter, and has disclosed several known narcotic peddlers to enter and exit the first floor apartment at this address, which apartment is occupied by Homer Phillips. The affiant further states he knows Homer Phillips to have dealt in narcotics for over seven (7) years, both in Chicago, Illinois, and St. Louis, Missouri, and that in 1956 he was convicted in the United States District Court in St. Louis, Missouri for possession of narcotics. On April 24, 1964, the affiant and Agent Hill observed one Homer Phillips to exit the front door and to enter his 1963 Pontiac convertible, License No. GU-5884. Investigation has further determined that Homer Phillips has lived on the first-floor apartment at the above-described address for over one year. On the date in question, Homer Phillips drove to 7112 South Halsted in Chicago, and entered a tavern known as the New Waikiki Lounge, where he was observed by Agent Hill and the affiant to meet with his brother, Tommie Lee Phillips, at which time he handed Tommie Lee Phillips a small tin foil package. Tommie Lee Phillips and one Johnny Littleton were observed by Agent Hill and affiant to leave the tavern and enter Littleton's 1963 Ford convertible, License No. 887-303. Tommie Lee Phillips was seated in the passenger's seat. Phillips and Littleton drove to the 4100 block of Wentworth, at which time they were stopped by Agent Hill and the affiant, who identified themselves as Agents of the Federal Bureau of Narcotics. Previous to this time, on April 2, 1964, Federal Bureau of Narcotics Agent Donald Tucker purchased a quantity of narcotics from one Lonnie Hatch. Tommie Lee Phillips was the source of supply in this case. At the time he stopped

Littleton and Phillips Agent Hill announced they were under arrest. At this time Phillips jumped out of the car and ran east towards State Street. As he neared State Street, he threw away a small tin foil package. This package was recovered by Agent Hill, the contents of which have been analyzed and found to contain 29.220 grams of heroin hydrochloride, a narcotic drug. Phillips was subsequently apprehended. The affiant further states that he knows tin foil packages are customarily used by narcotic peddlers as containers for narcotics."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Tuesday, March 7, 1967

Before
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Jr., Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HOMER PHILLIPS, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 15679

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, April 5, 1967

Before
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Jr., Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HOMER PHILLIPS, Defendant-Appellant. No. 15679	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.